In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-800

JOHN R. MOSELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction.

After a jury-waived trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of embezzling government property and converting it to his own use, in violation of 18 U.S.C. 641.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A) in an opinion that is not yet reported.

[1] 18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof * * *
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> [shall be guilty of an offense].

1. The evidence at trial showed that petitioner was employed as the Chief of Pharmacy Services by the Veterans Administration Hospital in Little Rock, Arkansas, from August 1970 through September 1972 (Tr. 6-7). An inventory of pharmacy records conducted after petitioner's departure disclosed a substantial shortage of narcotic drugs.[2]

As Chief Pharmacist, petitioner had access to the narcotic drugs stored in the pharmacy's safe. Although any pharmacist could initiate orders for such drugs, each request required approval by petitioner or his assistant (Tr. 11). The evidence showed further that each of the requests at issue herein was approved by petitioner (Gov't. Exhs. 1-9).[3]

The perpetual inventory[4] for September 1968 through June 1973 indicated that the pharmacy had received only fifty-nine bottles of Dilaudid; the drug request forms, however, disclosed that petitioner had personally received ninety bottles of this drug during the period from August 1970 through September 1972 (Tr. 18-23; Gov't. Exhs.

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[2]As stipulated by the parties, the inventory uncovered a shortage of the following drugs: 10,825 tablets of Dilaudid (.002 grams); 10,080 tablets of Dilaudid (.004 grams); 500 tablets of morphine sulfate (1/6 grain); and 1,051 tablets of morphine sulfate (.010 grams) (Tr. 55). See Pet. App. A, p. 5.

[3]The request forms also disclose that petitioner received the drugs when they were delivered by Supply, a separate division of the hospital.

[4]A perpetual inventory, which reflected all receipts and disbursements of each drug, was kept by the pharmacy (Tr. 13-17).

1-9).[5] According to one order form, petitioner had personally received forty-eight bottles of Dilaudid in a single delivery on July 12, 1971, but this receipt was never recorded in the perpetual inventory (Tr. 60-61; Gov't. Exhs. 4, 10-11).[6] The largest single amount of Dilaudid ever recorded in the inventory was six bottles (Tr. 20-23), and the pharmacist whose signature appeared on the order form as the initiator of the request for forty-eight bottles was certain that he had never placed such a large order (Tr. 60-61).

Albert Morgan, a former employee at the hospital, testified that he had purchased both Seconal and Dilaudid from petitioner (Tr. 73-76). Specifically, he testified that during 1971 and 1972 he purchased without a prescription, once or twice weekly, numerous bottles of Dilaudid for $400 each (Tr. 74-76). Petitioner at one time warned him that the drug had become more difficult to obtain because the hospital had hired new personnel (Tr. 78). H. L. Walters, an undercover agent who had been introduced to petitioner by Morgan, also purchased some "reds" (Seconal) from petitioner (Tr. 94-98).

Petitioner's defense consisted primarily of cross-examination of the witnesses in an effort to establish the accessibility of the safe where the narcotics were stored, the

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[5]A statement that the pharmacy had received fifty-nine bottles of Dilaudid during this period is not entirely accurate, because the inventory sheet which covered the period from July 1969 to May 1970 could not be located (Tr. 21). Nevertheless, these hospital records indicate the amount of the drug which was customarily available in the pharmacy.

[6]As noted, the perpetual inventory was incomplete because the inventory sheet which covered the period from July 1969 to May 1970 could not be located. See note 5, *supra*. However, petitioner's subsequent receipt of forty-eight bottles on July 12, 1971, should have appeared in the inventory, but it did not.

inaccuracy of the hospital records, and the hospital's practice of periodically destroying drugs.

2. We submit that the evidence, as outlined herein, was sufficient to support petitioner's conviction. Petitioner's contention that his conviction resulted from an improper inference on an inference was rejected by the court of appeals in a thorough opinion upon which we rely. The court correctly reasoned (Pet. App. A, pp. 6-8):

> The defendant's basic argument is that he had a right as Chief of Pharmacy Services to possess and control these drugs and therefore the government must also prove that he sold the drugs to establish a violation of §641. He argues that the government failed to prove a sale of government property since that fact may only be inferred after first inferring his wrongful conversion of the drugs. We disagree. This argument conveniently misconstrues the statute as well as the evidence before us.
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> The indictment charged in the language of the statute that the defendant "willfully and knowingly did embezzle and convert to his own use" certain specified government property in violation of 18 U.S.C. §641. The defendant's challenge is mistakenly based upon a belief that the government was required to demonstrate a sale to prove embezzlement and conversion. This is not the case. See *Morissette* v. *United States*, 342 U.S. 246, 271-72 (1952).
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> Similarly, the crime of embezzlement requires only proof of the wrongful taking. There was sufficient evidence of this culpable fact. Where, as here, there

is a substantial shortage in property committed to the possession of the defendant, and in fact acquired in the first instance at his request, and no plausible explanation of the shortage is tendered by the defendant, the trier of fact may reasonably infer from the circumstances that the custodian of the property has embezzled or converted it. See *United States* v. *Powell*, 413 F.2d 1037 (4th Cir. 1969); *O'Malley* v. *United States*, 378 F.2d 401 (1st Cir.), cert. denied, 389 U.S. 1008 (1967).

However, assuming that evidence of a sale was essential to the government's case, the proof of this fact rests upon evidence independent of the wrongful taking. Morgan's testimony established a direct sale of a large quantity of Dilaudid. The court could infer from this testimony, along with all the other facts and attendant circumstances, that Moseley was wrongfully converting the drugs through unauthorized sales.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.